Part III

Administrative, Procedural, and Miscellaneous

26 CFR 601.601: Rules and regulations.
(Also: Part I, § 857)

Rev. Proc. 2008-69

SECTION 1. PURPOSE

This revenue procedure provides real estate investment trusts (REITs) with a method for applying the prohibited transactions tax safe harbor under §§ 857(b)(6)(C)(iii) and (D)(iv) of the Internal Revenue Code for a taxable year that begins on or before July 30, 2008, and ends on or after July 31, 2008. Sections 857(b)(6)(C)(iii) and (D)(iv) were amended by the Housing Assistance Tax Act of 2008, Division C of Pub. L. No. 110-289 (“2008 Housing Act”), effective for sales made after July 30, 2008, the date of the 2008 Housing Act’s enactment.

SECTION 2. BACKGROUND

.01 Section 857(b)(6) of the Code imposes a tax for each taxable year of a REIT equal to 100 percent of the net income derived from prohibited transactions. Under § 857(b)(6)(B)(iii), the term "prohibited transaction" means a sale or other disposition of property described in § 1221(a)(1) that is not foreclosure property.

.02 Section 857(b)(6)(C) excludes certain sales from the definition of a prohibited transaction ("the prohibited transaction safe harbor"). Under § 857(b)(6)(C), a sale of property that is a real estate asset as defined in § 856(c)(5)(B) is not a prohibited transaction if several requirements are satisfied. A similar safe harbor applies under § 857(b)(6)(D) for sales of property in connection with the trade or business of producing timber.

.03 Prior to the enactment of the 2008 Housing Act, §§ 857(b)(6)(C)(iii) and (D)(iv) provided that the prohibited transaction safe harbor applied only if —

- During the taxable year, the REIT made no more than 7 sales of property (other than sales of foreclosure property or sales to which § 1033 applies) ("7-Sales Test") ; or
- The aggregate adjusted bases (as determined for purposes of computing earnings and profits) of property (other than sales of foreclosure property or sales to which § 1033 applies) sold during the taxable year did not exceed 10 percent of the aggregate bases (as so determined) of all of the assets of the REIT as of the beginning of the taxable year ("10-Percent Adjusted Bases Test").

.04 Section 3052 of the 2008 Housing Act amended §§ 857(b)(6)(C)(iii) and (D)(iv) to provide an additional alternative test. Under this alternative test, the requirements of § 857(b)(6)(C)(iii) or (D)(iv) are satisfied if the aggregate fair market value of property (other than sales of foreclosure property or sales to which § 1033 applies) sold during the taxable year does not exceed 10 percent of the fair market value of all of the assets of the REIT as of the beginning of the taxable year ("10-Percent Fair Market Value Test"). This amendment is effective for sales made after July 30, 2008.

.05 Because this effective date is expressed in terms of sales made after a particular date, questions have arisen about how to interpret it for substantive provisions that apply as alternatives and are expressed in terms of sales during a taxable year.

SECTION 3. SCOPE

This revenue procedure applies to a REIT that seeks to apply the prohibited transaction safe harbor under § 857(b)(6)(C)(iii) or (D)(iv) for a taxable year that begins on or before July 30, 2008, and ends on or after July 31, 2008.

SECTION 4. APPLICATION

For a REIT's taxable year that begins on or before July 30, 2008, and ends on or after July 31, 2008, satisfaction of § 857(b)(6)(C)(iii) or of § 857(b)(6)(D)(iv) means that either—

- The REIT satisfies the 7-Sales Test (for the entire taxable year);
- The REIT satisfies the 10-Percent Adjusted Bases Test (for the entire taxable year); or

- Both –
    - The aggregate adjusted bases (as determined for purposes of computing earnings and profits) of property (other than sales of foreclosure property or sales to which § 1033 applies) sold during the portion of the taxable year ending on July 30, 2008, did not exceed 10 percent of the aggregate bases (as so determined) of all of the assets of the REIT as of the beginning of the taxable year (that is, the REIT satisfies the 10-Percent Adjusted Bases Test as if the portion of the taxable year ending on July 30, 2008, were an entire taxable year); and
    - The REIT satisfies the 10-Percent Fair Market Value Test (for the entire taxable year).

SECTION 5. EFFECTIVE DATE

This revenue procedure is effective November 13, 2008.

SECTION 6. DRAFTING INFORMATION

The principal author of this revenue procedure is Jonathan D. Silver of the Office of Associate Chief Counsel (Financial Institutions & Products). For further information regarding this revenue procedure contact Mr. Silver on (202) 622-3930 (not a toll free call).